(6)

No. 98-262

In The

Supreme Court of the United States

October Term, 1998

BILL MARTIN, et al.,

Petitioners,

v.

EVERETT HADIX, et al.,

Respondents.

and

BILL MARTIN, et al.,

Petitioners,

v.

MARY GLOVER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS

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PARTIES TO THE PROCEEDING

Martin v. Hadix:

Petitioners, Bill Martin is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Hadix; and several John Does, are persons who are or were confined in the custody of the Michigan Department of Corrections.

Martin v. Glover:

Petitioners, Bill Martin is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau of Prison Industries; Robert Steinman is Director of

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[1] Bill Martin is the successor in office to Kenneth L. McGinnis and is substituted for him pursuant to Sup. Ct. R. 35.3

PARTIES TO THE PROCEEDING – Continued

MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the custody of the Michigan Department of Corrections.

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[2] Bill Martin is the successor in office to Kenneth L. McGinnis and is substituted for him pursuant to Sup. Ct. R. 35.3.

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STATEMENT OF THE CASE

The present cases are class action lawsuits involving male (Hadix) and female (Glover) prisoners under the jurisdiction of the Michigan Department of Corrections ("MDOC"). These cases were consolidated to address the applicability of the attorney's fees provisions of the Prison Litigation Reform Act of 1995 ("PLRA" or "Act"), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), to services performed both prior to and subsequent to the passage of the Act. *Johnson v. Hadix*, Order granting writ of certiorari, 11/16/98, App. at 217a.

Both *Hadix* and *Glover* are pending cases in which the following acts occurred prior to the passage of the PLRA: 1) Judgments were entered placing the cases in a post-judgment remedial stage; 2) Plaintiffs were awarded fees as prevailing parties; 3) Court orders were entered establishing Plaintiffs' entitlement to attorney's fees at a prevailing market rate; 4) The parties stipulated to orders agreeing to Plaintiffs' entitlement to all reasonable post-judgment monitoring fees; and 5) Orders were entered establishing a specific prevailing market rate to be paid for post-judgment monitoring. The specific history and proceedings of the cases are detailed below.

A. *Glover v. Johnson*

The procedural history of the *Glover* case is detailed in *Glover v. Johnson*, 931 F. Supp. 1330, 1362-1363 (E.D. Mich. 1996), and is not repeated here except as it relates to the instant appeal.

In 1977, Respondents (hereinafter "Plaintiffs") filed an action seeking a declaratory judgment for violation of their rights under the Equal Protection Clause of the Fourteenth Amendment and their right of access to the courts. After a bench trial, the district court ruled that Petitioners (hereinafter "Defendants") had violated the Equal Protection Clause and failed to provide Plaintiffs meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979). A "final order" was subsequently entered detailing the steps Defendants were to take to remedy these violations. *Glover v. Johnson*, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981). Plaintiffs were thereafter found to be prevailing parties and awarded attorney's fees pursuant to 42 U.S.C. §1988. App. at 103a.

On November 12, 1985, the parties entered into a stipulated order entitling Plaintiffs to attorney's fees for post-judgment monitoring of the court's decrees and establishing a procedure for the submission of Plaintiffs' petitions for attorney's fees and costs, on a semi-annual basis, with the district court resolving any disputes as to the reasonableness of the fees or the appropriate market rate. App. at 125a.

During the 1980s, Defendants' failure to obey federal court orders resulted in findings of contempt and an order for Defendants to submit a remedial plan to cure Constitutional violations. *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991). Throughout Plaintiffs' efforts to ensure compliance with federal court orders, the Sixth Circuit affirmed Plaintiffs' ongoing entitlement to attorney's fees at the prevailing market rate for post-judgment monitoring. *Glover v. Johnson*, 934 F.2d 703, 715-716 (1991).

In the course of monitoring Defendants' compliance, Plaintiffs submitted a fee petition for services performed between July 1, 1995, and December 31, 1995. While a motion to resolve objections to certain hours was pending, the Prison Litigation Reform Act was signed into law. Defendants argued that the Act applied to all attorney's fees for services performed prior to the Act's passage that had not yet been paid on the date of enactment. The district court ruled that the PLRA did not apply to an award of attorney's fees for legal services completed prior to the enactment of the PLRA, a decision which was affirmed by the Sixth Circuit. App. at 148a, *aff'd*, *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), App. at 164a. Defendants sought no review of this opinion and have made payment without reservation for all pre-passage services at previously-established market rates.

Subsequently, Plaintiffs submitted a fee petition for the time period of January 1, 1996, through June 30, 1996. This petition included fees for time worked both pre- and post-passage of the PLRA. Ruling on Defendants' assertion that the Act should apply to hours worked both prior to and subsequent to the Act's passage, the district court reiterated its prior ruling that the PLRA's attorney's fee provisions do not apply to pre-enactment services but ruled that the Act did apply to services performed after the Act's enactment. Pet. App. at 33a. *See also* App. at 153a (opinion and order denying reconsideration and hearing on equal protection issue). The Sixth Circuit, in a consolidated appeal with a nearly identical opinion in *Hadix*, ruled that the fee limitations of the Act do not apply to these pending cases. *Hadix v. Johnson*, 143 F.3d

246 (6th Cir. 1998) (hereinafter "*Hadix/Glover*"), Pet. App. at 1a.

B. *Hadix v. Johnson*

This class action was filed under 42 U.S.C. §1983 in 1980 in the United States District Court for the Eastern District of Michigan by male prisoners incarcerated in the Central Complex of the State Prison of Southern Michigan, asserting that the condition of their confinement violated their First, Eighth and Fourteenth Amendment rights.

Five years later, the parties entered into a comprehensive consent decree designed to "assure the constitutionality of the conditions under which prisoners are incarcerated." The consent judgment addressed, *inter alia*, sanitation, safety, mental health, health care, medical, fire safety, overcrowding and protection from harm, access to courts, food service, management, and mail. *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998), App. at 96a.

On November 19, 1987, the district court entered an order establishing Plaintiffs' entitlement to attorney's fees for all reasonable post-judgment monitoring. App. at 79a. Thereafter, Plaintiffs submitted and were compensated for fees at the prevailing market rate on a bi-annual basis. A specific market rate was established in 1991 and affirmed by the Court of Appeals. *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

While the process established to complete the requirements of the consent judgment and bring finality to the case was proceeding, the PLRA became effective on

April 26, 1996. Defendants challenged Plaintiffs' entitlement to continued attorney's fees pursuant to the 1987 order, asserting the PLRA's fee provisions applied to limit both pre- and post-enactment services. In proceedings which parallel the events in *Glover*, the district court held that the PLRA's fee provisions did not apply to services performed prior to its enactment, a decision that was affirmed by the Sixth Circuit. App. at 91a, *aff'd*, *Hadix v. Johnson*, 144 F.3d 925, 946 (6th Cir. 1998), App. at 101a-102a (rejecting Defendants' argument that the PLRA's language provided that no award of fees could be entered after its passage as resulting in an impermissible retroactive effect). As in the *Glover* litigation, Defendants sought no review of this decision and paid, without reservation, all of Plaintiffs' attorney's fees for pre-passage services at the previously-established market rate.

Defendants subsequently challenged Plaintiffs' entitlement to post-enactment fees. In a ruling nearly identical to its *Glover* decision on the same issue, the district court ruled that the application of the fee provision to post-enactment services would not constitute a retroactive application of the statute. Pet. App. at 27a. This holding was reversed by the Sixth Circuit in the previously-referenced consolidated opinion. *Hadix/Glover*, 143 F.3d 246 (6th Cir. 1998), Pet. App. at 1a.

Defendants thereafter filed a petition for a writ of certiorari with this Court seeking to review only the question of whether the PLRA's provisions limiting attorney's fees apply to pending cases for services performed after the passage of the Act.

SUMMARY OF ARGUMENT

The strong presumption against retroactive legislation can only be overcome by an "unambiguous directive" or "express command" that the statute in question applies to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). The text of the PLRA's attorney's fee provision, §803(d), contains no such directive.

Where a statute does not clearly and unambiguously indicate that it is intended to apply to pending cases, the Court is to use traditional rules of statutory construction to determine whether Congress intended the statute to be applied prospectively only. *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997). The use of explicit retroactive language in §802 of the Act and omission of similar language from §803, the section at issue in this case, along with the removal of the fee provision from §802 to §803 provides evidence that Congress intended these provisions to apply only to cases brought after passage of the Act. As such, there is no need for the Court to go further in its analysis, and the Act should not be applied to the present cases. *Lindh*, 117 S.Ct. at 2063.

Further, application of the attorney's fee provisions to pending cases would have a retroactive effect and therefore is prohibited under the traditional presumption against retroactivity. *Landgraf*, 511 U.S. at 280. If the attorney's fee provisions of the PLRA are applied to pending cases, attorneys who were induced to file such cases, relying upon the provision for the recovery of such fees under 42 U.S.C. §1988, will be compensated at below-market rates for hours reasonably spent litigating the cases. The Act also limits the amount of money plaintiffs

can recover in civil rights actions and reduces their compensation after they have already filed and, in some instances, won their cases. Such a result would have a retroactive effect and, as Congress did not make clear its intention to apply the fee provisions to pending cases, this Court should decline to give the statute retroactive effect and affirm the Court of Appeals' decision.

ARGUMENT

I. THE LANGUAGE OF THE PLRA'S ATTORNEY'S FEE PROVISIONS DOES NOT EXPRESS AN INTENT TO APPLY THESE SECTIONS RETROACTIVELY.

The first inquiry for determining whether a statute applies to pending cases is whether Congress, using clear, unambiguous language, has expressly prescribed the statute's proper reach. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994); *Lindh v. Murphy*, 117 S.Ct. 2059, 2062-63 (1997).[1]

In *Landgraf*, this Court considered whether §102 of the Civil Rights Act of 1991, authorizing compensatory and punitive damages in certain civil rights actions, applied to cases pending at the time of passage of the Act. The statutory provision at issue provided that "In an

[1] Demonstrating the rigor with which this Court enforces its "clear statement" rules, *Lindh* gave as an example of possible unambiguous intent the following language: "This Act shall apply to *all* proceedings pending on or commenced after the date of the enactment of the Act." *Lindh*, 117 S.Ct. at 2064 n.4, *citing Landgraf*, 511 U.S. at 260 (emphasis added by *Lindh* Court).

action brought by a complaining party under section 706 or 71 of the Civil Rights Act of 1964 . . . the complaining party may recover compensatory and punitive damages." This Court found that neither this language nor any other in the statute constituted the "express command," or "unambiguous directive" necessary to require the Act's application to a case pending at the time of its passage. *Landgraf*, 511 U.S. at 263, 280. Similarly the statutory language at issue in *Lindh*, which directed that "[a]n application for a writ of habeas corpus . . . shall not be granted," except as otherwise provided, 28 U.S.C. §2254(d), was found insufficiently clear to mandate the statute's application to pending cases. *Lindh*, 117 S.Ct. at 2063-64.

The section at issue in this case, like those in *Landgraf* and *Lindh*, lacks the "unambiguous directive" that it apply to pending cases. The PLRA's attorney's fee provision provides:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded except to the extent that . . .
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150% of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

PLRA §803(d)(d).

The language of §803(d) of the PLRA parallels the language in *Landgraf* and *Lindh*, directing that: "in any action brought . . . fees shall not be awarded" except as otherwise provided, and similarly fails to meet the requirement of an unambiguous expression of Congressional intent to apply the Act to pending cases. *Hadix/Glover*, Pet. App. at 10a (referencing the circuit court's prior opinion in *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), App. at 202a).

The majority of courts to consider this issue have held that the statute's language does not demonstrate a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases, evidencing a failure to meet the Court's requirement that the language be so clear as to "sustain only one interpretation." *Lindh*, 117 S.Ct. at 2064 n.4.[2]

To the extent that §803 manifests Congressional intent regarding its effective date, the language is forward-looking, intending to cover only cases "brought" after its effective date.[3] As was noted above, §803 states

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[2] *See, e.g., Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998), App. at 96a; *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996). Two circuit courts of appeal have reached the opposite conclusion. *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*; *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998).

[3] Defendants' argument that the word "brought" is a past-tense verb referring to cases "previously brought" is unpersuasive. Given the grammatical construction of §803(d), "brought" could just as easily be a past participle, which acts as an adjective, modifying the noun "action." *See Random House*

that "[i]n any action brought by a prisoner . . . " attorney's fees will be limited to 150% of the rate for court-appointed counsel. This language implies that the action to be "brought" – that is, filed – after the Act's effective date, April 26, 1998, in order to apply. *Cf. Landgraf*, 511 U.S. at 288 (" '[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment' . . . ") (Scalia, J, Kennedy, J., and Thomas, J., concurring). If Congress had intended to cover pending cases, it would have had no reason to include the word "brought" in the section and could have merely stated that "in any action by a prisoner" such fee limits would apply.

Absent unequivocal language prescribing the temporal reach of the statute, and in the face of clear language in another section of this statute containing such language (§802(b)(1)) and the statute's legislative history (see Argument II, *infra*), the Sixth Circuit correctly found that the attorney's fee provisions set forth in §803(d) are inapplicable to cases pending on the date of the statute's enactment.

Unabridged Dictionary, 2d ed. (1993) at 267 ("brought (brôt), v. pt. and pp. of bring) and *Oxford English Dictionary*, 2d ed. (1989), vol. II at 590. The word in isolation is thus ambiguous because it could be intended to refer to "any action that was brought" or "any action that is brought," with significantly different results based on which was intended. As is discussed below, Plaintiffs contend that based upon the structure of the Act and its legislative history, the phrase as used in the PLRA is intended to cover only actions that are brought after the effective date of the statute.

II. BASED UPON THE STATUTORY CONSTRUCTION OF THE PLRA AND LEGISLATIVE HISTORY OF THE ACT, CONGRESS INTENDED THE ATTORNEY'S FEE PROVISIONS TO APPLY PROSPECTIVELY.

A. The Structure of the PLRA.

Absent express language specifying a statute's temporal reach, other rules of statutory construction may apply to remove even the possibility of retroactivity, irrespective of the existence of retroactive effect. *Lindh*, 117 S.Ct. at 2063. Applying the normal rules of statutory construction to the PLRA supports the conclusion that Congress intended the Act's fee limits apply only to cases filed after the passage of the Act.

In *Lindh*, the Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (hereinafter "AEDPA"), amending the federal habeas statute, applied to a habeas application that was pending at the time the new statute was enacted. Finding that the sections in question should not be applied to pending cases, the Court relied heavily upon the fact that chapter 154 of the AEDPA contained a section that expressly applied the chapter to pending cases, while the chapter under consideration in *Lindh*, chapter 153, did not. The Court noted:

> If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases.

> Nothing, indeed, but a different intent explains the different treatment.

Lindh, 117 S.Ct. at 2064.

A similar analysis applied to the PLRA requires the same conclusion. The attorney's fee provisions of the PLRA, amending 42 U.S.C. §1997e, are found in §803 of the Act. As Defendants acknowledge (Defendants' Brief at 14, 18), this section is silent as to its applicability to pending cases. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly provides that that section is to be applied to pending cases, stating:

> Section 3626 of Title 18 United States Code as amended by this Section [802] shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). This canon of statutory interpretation, referred to as *"expressio unius est exclusio alterius,"* must be applied unless there is clear evidence of a contrary legislative intent. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

In *Landgraf*, this Court articulated the presumption of non-retroactivity to "giv[e] legislators a predictable background rule against which to legislate." 511 U.S. at 273. Congress was no doubt aware of this "predictable background rule" when it enacted the PLRA, just two years later. In response to this clear statement from the Court, Congress chose to specify that §802 was applicable to pending cases while adding no such language to §803.

The absence of retroactivity language in §803 and the presence of such language in §802 thus triggers the presumption, which Defendants must rebut with clear evidence, that Congress intended the two sections to be treated differently with regard to their temporal application. Defendants' proffer of an alternate explanation for the disparate language in the two sections of the Act does not provide this clear evidence of contrary legislative intent. Defendants argue that the absence of retroactivity language in §803 is "easily explained" because there was "no compelling reason [for Congress] to specify that the law [would] apply to conduct – such as work to be done by lawyers in the future – which would occur only after the Act's effective date." (Defendants' Brief at 21.) Yet Defendants contend that §803(d) *does* affect conduct before its effective date by retroactively reducing the plaintiff's attorney's fees by, among other things, cutting the hourly rate for time worked *before* the passage of the Act. Defendants urge this Court to accept the analysis proffered by the Ninth and Fourth Circuits that the plain language of the Act requires a reduction of all fees awarded after the effective date of the act, including fees for services rendered prior to its passage. *See Madrid v.*

Gomez, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*; *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998). (Defendants' Brief at 14-15.) Defendants state that it is not the timing of the work or conduct but rather the date of the judicial action in awarding the fee that is relevant. Under Defendants' interpretation, even if the court, as in both of the present cases, had already established by court order the prevailing market rate at which plaintiff's counsel would be paid, where the court's order for actual payment of fees occurred even one day after the passage of the Act, all of the plaintiff's attorney's fees would be reduced to the PLRA-imposed cap. One would have expected Congress to speak clearly had it intended to so affect pre-passage conduct.[4]

B. The Legislative History of the PLRA.

Congressional intent with regard to a statute's temporal application may also be determined by reference to the Act's legislative history. *See, e.g., Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990); *Hutto v.*

[4] Moreover, the text of the statute is not consistent with a Congressional intent to apply the statute only to post-Act fees but not to pre-Act fees awarded after the Act's passage. "[A] court would have to find that Congress relied upon the same statutory language to convey an intent that the temporal reach of the statute is dependent upon the timing of the work, i.e., that it intended the fee provision to apply in pending cases for post-enactment fees but did not intend the provision to apply in pending cases for pre-enactment fees. We do not believe the statutory construction is capable of such a sophisticated construction; either the fee provision applies in pending cases or not." *Hadix/Glover*, Pet. App. at 11a.

Finney, 437 U.S. 678, 694 n.23 (1978). As in *Lindh*, the conclusion that §803 does not apply to pending cases, based on the inclusion of express language applying §802 to pending cases and the omission of this language in §803, is strengthened by the Act's legislative history. The attorney's fee restrictions were initially contained in what became §802 of the Act, which contained language making them applicable to pending cases, and were moved out of this section to what became §803, which contains no such language. While the *Lindh* Court found Congressional intent in favor of prospective application to exist solely with a side-by-side comparison of two sections of the statute, one containing express language and the other omitting the language, that conclusion is strengthened where one provision is moved from a section of an act containing express language mandating application to pending cases and placed in another section not containing such language. Moreover, when Congress moved the fee restrictions from §802 to §803, it added additional provisions which could only apply to future cases, further supporting the conclusion that the attorney's fee section as a whole was not intended to apply to pending cases.

What eventually became the PLRA was originally introduced as part of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong., 1st Sess., 141 Cong. Rec. H691 (daily ed. Jan. 25, 1995). Title III of this Act was entitled the "Stop Turning Out Prisoners" (STOP) Act and was the predecessor to §802.[5] The STOP Act included a

[5] The "STOP" legislation was introduced in the Senate as S. 400. 104th Cong., 1st Sess., 141 Cong. Rec. S2649 (daily ed. Feb. 14, 1995).

limitation on attorney's fees that, as with the rest of the STOP provisions, was specifically directed at ongoing litigation and was expressly made applicable to pending cases.[6] Specifically, §301(b) provided that the changes in that title, including the attorney's fee limits, "shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." Title II of H.R. 667 addressed Congress' concern with frivolous prisoner litigation and is the predecessor to §803 of the PLRA. Drafted as an amendment to the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 42 U.S.C. §1997d ("CRIPA"), the title II amendments contained neither an effective date nor a limitation on attorney's fees.

During the legislative process, the provisions limiting attorney's fees were deliberately moved from the STOP Act, amending 18 U.S.C. §3626, to the section amending CRIPA. This change occurred with the introduction of S. 1275. 104th Cong., 1st Sess., 141 Cong. Rec. S14317-18 (daily ed. Sept. 26, 1995). Senate bill 1275 continued to expressly apply the STOP Act provisions to pending cases. However, in S. 1275, the attorney's fee limitations

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[6] The STOP Act attorney's fees section stated: "No attorney's fees under section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) may be granted to a Plaintiff in a civil action with respect to prison conditions except to the extent such fee is – (1) directly and reasonably incurred proving an actual violation of the plaintiff's Federal rights; and (2) proportionally related to the extent the plaintiff obtains court ordered relief for that violation." H.R. 667, §301(a)(f). The STOP Act's attorney's fee limits did not include a fee cap.

were moved from the STOP section, which was expressly applicable to pending cases, to the CRIPA section, which contained no effective date nor any statement of applicability to pending cases.

In addition to the fee limits originally included in the STOP legislation, S. 1275 added provisions referencing damages, attorney's fees, and retainer agreements. The attorney's fee provisions of S. 1275, §3(f), required that a portion of a plaintiff's monetary judgment be applied to the fee awarded against the defendant (§3(f)(2)), limited the amount of fees for which defendants were responsible to 125% of the monetary judgment (§3(f)(2)), and capped attorney's fees at 100% of the CJA rate (§3(f)(3)).[7] In addition, the statutory language of the fee limits was changed from that of H.R. 667 ("no attorney's fees . . . may be granted except . . . ") to language nearly identical to that found in the enacted statute ("in any action brought . . . such fees shall be awarded only if . . . ").

The day after the introduction of S. 1275, yet another prison litigation reform bill, S. 1279, was introduced. S. 1279, 104th Cong., 1st Sess., 141 Cong. Rec. S14414 (daily

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[7] Congress undoubtedly was aware that an attempt to apply the restrictions to reduce a previously-awarded judgment would have an impermissible retroactive effect. The bill further provided that it did not prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than that authorized in the subsection. (§3(f)(4)). Because such agreements would have to be made at the time representation began, this section of the bill fit with the other forward-looking subsections aimed at future cases. All of the fee limitations were made part of the CRIPA amendments of 42 U.S.C. §1997, leaving behind the retroactivity provision of 18 U.S.C. §3626.

ed. Sept. 27, 1995). This latter bill combined provisions of an earlier bill, S. 866, as well as the STOP legislation and S. 1275. 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (comments of Sen. Dole, sponsor of S. 1279). As in S. 1275, the STOP Act provisions were made expressly applicable to pending cases, and the CRIPA amendments were not. Moreover, as in S. 1275, S. 1279 placed the attorney's fee limits with the CRIPA amendments, where they remained in the bill that was finally enacted into law.

The removal of the attorney's fee provisions from the section that contained explicit retroactive language is strong evidence that Congress intended that pending cases would not be subject to the fee limitations. This principle was stated by the Court in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), where, in finding a statute retroactive, the Court examined its legislative history and noted that an initial provision for prospective application was later stricken by the full Senate. *Id.* at 716 n.23. Given this legislative history, the *Bradley* Court stated that it was "reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id. See also United States v. $814,254.76*, 51 F.3d 207, 212 (9th Cir. 1995) (explicit deletion of retroactivity provision is strong evidence that Congress intended only prospective application).

Defendants' argument that §§802 and 803 address different facets of Congress' intent to place limits on prisoner civil rights litigation does not weaken the applicability of the *Lindh* analysis to this statute.[8] Rather, as the Sixth Circuit

[8] Defendants cite to *Field v. Mans*, 516 U.S. 59 (1995), for the proposition that where statutory provisions are less closely related, the negative inference is "far weaker." (Defendants' Brief at 20-21.) Unlike the statute under review here, the sections of the Bankruptcy Code reviewed in *Field* developed independently over the course of 100 years. Moreover, as the *Field* Court noted, "[t]he more apparently deliberate the contrast [in two sections of a statute], the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects." *Id.* at 75 (citation omitted).

recognized, while both sections address what Congress perceived as excesses in the area of prison litigation, §802 addresses the mechanism for terminating longstanding cases such as the instant ones and contemplates resolving perceived excesses of the judiciary in post-judgment cases; it therefore logically contains express language of its applicability to such pending cases. *Hadix/Glover*, Pet. App. at 16a.

"In contrast, the CRIPA amendments [§803] are forward looking as they are aimed at curtailing the *filing* of frivolous lawsuits." *Hadix/Glover*, Pet. App. at 16a (emphasis in original). The placement of the attorney's fee provision in the section addressing primarily pre-filing issues evidences both Congressional recognition that attorney's fees under 42 U.S.C. §1988 are intended as a pre-filing inducement and that any intended deterrence to attorneys filing "frivolous" cases, by decreasing the potential recovery to substantially less than market rates, addresses future cases.[9]

[9] Defendants describe the purpose of the PLRA by quoting the statement of Senators Dole and Abraham in support of the Act's passage. (Defendants' Brief at 10.) In each instance, Defendants omit the portion of the quote which includes their goal of "dramatically reduc[ing]" or "limiting frivolous

The conclusion that the PLRA's fee provisions were intended to cover only future cases is confirmed by the statement of Sen. Abraham of Michigan, the sponsor of S. 1275. Upon introducing the bill, the first version of the PLRA to move the fee provisions to the CRIPA section, Sen. Abraham stated the purpose of the proposed attorney's fee provisions:

> Finally, the bill contains several measures to reduce frivolous inmate litigation. The bill limits attorney's fee awards . . .
>
> * * *
>
> And no longer will attorneys be allowed to charge very high fees for their time. The fee must be calculated at an hourly rate no higher than that set for court appointed counsel. And up to 25 percent of any monetary award the court orders the plaintiff wins will go toward payment of the prisoner's attorney's fees.

141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995).[10]

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prisoner litigation." *See* 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (Sen. Dole) and S14316 (daily ed. Sept. 26, 1995) (Sen. Abraham), respectively. In fact, the comments of Sen. Dole cited by Defendants actually reference his discussion of the STOP Act provisions of the bill, §802, which were made applicable to pending cases, and not the CRIPA amendments, which included the attorney's fee limits.

[10] The only other CRIPA amendment in S. 1275 allowed for telephonic hearings in certain circumstances. In describing this provision, Sen. Abraham stated that it was also designed as a deterrent, "to keep prisoners from using lawsuits as an excuse to get out of jail for a time [to attend pretrial hearings]." 141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995). Such language evinces an intent that all of the CRIPA amendments apply only to future cases.

Since, *ipso facto*, the PLRA's fee limits could not discourage the filing of *pending* cases, applying §803(d) only to cases brought after its passage would be the interpretation consistent with the section's stated purpose.[11] Moreover, the other, non-fee-related sections of §803(d) also relate to future cases. Section 803(d)(a), referring to administrative remedies, explicitly states, "No action shall be brought . . . ," clearly indicating that it applies only to future cases. *See Wright v. Morris*, 111 F.3d 414, 418 (6th Cir. 1997), *cert. den.*, 118 S.Ct. 263 (1998). Section 803(d)(c) concerns the dismissal of frivolous actions on the court's own motion, something that would apply only in new actions, given that a motion to dismiss is usually standard in any such case. Section 803(d)(f) concerns the telephonic hearings referenced above, and section 803(d)(g) allows defendants to waive the right to reply to an action without that action constituting an admission of any allegations in the complaint. Such a procedure is only needed in new cases, since in cases filed prior to the Act,

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[11] Defendants argue that the attorney's fee limits were not intended to discourage frivolous suits because fees are never awarded in frivolous suits but only if the Plaintiff prevails. (Defendants' Brief at 22.) Congress' use of the term "frivolous" was not synonymous with the judicial use of the term, as it evidently considered "frivolous" cases to include ones in which the plaintiff prevailed on a *de minimus* or "technical" issue. *See* H.R. Rep. 104-21 at 28 (1995), the Judiciary Report accompanying H.R. 667, which notes with regard to sub-section (f) covering attorney's fees, and specifically the proportionality requirement, that "[t]his proportionality requirement will discourage burdensome litigation of insubstantial claims where the prisoner can establish a technical violation of a federal right but he suffered no real harm from the violation."

the defendants would have generally filed a reply or other motion.

Also relevant to applying the traditional rules of statutory construction is the use of similar language in other attorney's fee statutes. Congress used language nearly identical to that of the PLRA when it passed the Handicapped Children's Protection Act (HCPA) of 1986, Pub. L. No. 99-372, 100 Stat. 796, authorizing attorney's fees "[in] any action or proceeding brought under this subsection." 20 U.S.C. §1415(e)(4)(B). However, because Congress wished this new section, enacted for the purpose of overturning a recent Supreme Court decision,[12] to apply not only to future cases but also to those pending at the time of passage, it added a section (HCPA §5) stating:

> The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984 [the day before the *Smith* decision was issued].

Because Congress used no such retroactive language in enacting the PLRA, it is clear that the attorney's fee

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[12] The fee provision of the Act overturned *Smith v. Robinson*, 468 U.S. 992 (1984), which had held that "the [Education of the Handicapped Act] was the exclusive avenue through which handicapped children could pursue claims against educational authorities and that attorney's fees were not recoverable in actions brought to secure EHA rights." *Counsel v. Dow*, 849 F.2d 731, 734 (2nd Cir. 1988), *cert. denied*, 488 U.S. 955 (1988).

limits here do not apply retroactively and that in using the phrase "in any action brought," Congress was referring solely to cases brought after the passage of the PLRA on April 26, 1996.

C. Application of §803(d) to Pending Cases Would Conflict with Other Sections of the Act.

To apply the PLRA fee provisions to all pending cases would sweep within the statute a class of plaintiffs – former prisoners – who were explicitly excluded at the time the Act was passed. Section 803 of the Act only covers claims by prisoners who are "confined to any jail, prison, or other correctional facility."

Many pending cases involve plaintiffs who have been released from prison subsequent to the initiation of suit. The Act does not state that it applies to "any action brought by a prisoner who *[was]* confined" to any jail, but rather uses the present tense to make clear a more limited scope. Indeed, the very definition of "prisoner" in §803 accentuates this point by providing that "prisoner" means "any person incarcerated or detained in any facility." PLRA §803(h). *See Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1998), finding that §803(e) does not apply to former prisoners. *See also Lafontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998) (§804(a)(3) does not apply to former prisoners); *McGann v. Commissioner, SSA*, 96 F.3d 28 (2nd Cir. 1996) (same). Congress presumably had less interest in regulating the activities of former prisoners who have much less incentive to abuse the litigation system. *Kerr*, 138 F.3d at 323. Under Defendants' interpretation, the statute would apply retroactively not only to cases brought before its

effective date, but also to parties who at the time of enactment were outside the class to be regulated. This Court should not lightly construe a statute to apply to a class of parties who are explicitly excluded from the Act's coverage.

Where statutory "construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as . . . the recognition of a negative implication would do here," the Court need not apply the judicial default rules traditionally employed in the second step of the *Landgraf* analysis. *Lindh*, 117 S.Ct. at 2063. As such, this Court should affirm the Court of Appeal's decision that the PLRA's attorney's fee limits are inapplicable to cases that were pending at the time the Act was passed.

III. APPLICATION OF THE PLRA'S ATTORNEY'S FEE PROVISIONS TO A CASE PENDING AT THE TIME OF PASSAGE OF THE ACT WOULD HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT.

A. The Presumption Against Retroactive Application of a Statute.

"If [a] statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280.[13] This presumption against retroactivity is "deeply rooted" in our jurisprudence, reflecting that:

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[13] For the reasons detailed in Sections I and II, it must be concluded that such "clear congressional intent" is absent in this case.

> [e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Id. at 265 (internal footnote omitted).[14]

Describing circumstances that constitute an impermissible retroactive effect, this Court cited approvingly from Justice Story's definition, *see Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCDNH 1814) 28, stating:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive.

Landgraf, 511 U.S. at 269.

However, these examples do not

> purport to define the outer limit of impermissible retroactivity. Rather [they] merely described that any such effect constitute[s] a *sufficient*,

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[14] The Court continued, 511 U.S. at 272, noting that

> [b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

> rather than a *necessary*, condition for invoking the presumption against retroactivity.

Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S.Ct. 1871, 1876 (1997) (emphasis in original).

In *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), the Court was faced with a statute, similar to the one presently before the Court, that reduced the commission of certain customs inspectors from three percent to two and one-half percent. The question faced by the Court was whether this reduction applied to all commissions received after the effective date or whether, for goods imported prior to that date but for which the commissions were not paid until after, the previous rate of three percent should apply. In holding the statute inapplicable to what could be termed "pending imports," Johnson, J., noted:

> [W]here an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.

Heth, 3 Cranch at 408 (Johnson, J.).

B. Application of the Presumption Against Retroactivity to the PLRA.

Consideration of the elements of notice, reliance and expectations of both prevailing plaintiffs in civil rights cases and their counsel lead to the conclusion that the application of the PLRA's fee provisions to cases filed prior to the Act's enactment would have an impermissible retroactive effect.

i. Congressional Intent Underlying §1988.

The very purpose of §1988 was to create an expectation on the part of plaintiffs' counsel of an award of reasonable attorney's fees in meritorious civil rights cases and thereby to induce attorneys to file meritorious cases on behalf of plaintiffs whose constitutional rights had been violated. *Kay v. Ehrler*, 499 U.S. 432, 436-37 (1991); *Evans v. Jeff D.*, 475 U.S. 717, 731 (1986). As the legislative history of §1988 makes clear, without access to attorney's fees at market rates, citizens – including prisoners – will have no effective way to vindicate their federal constitutional rights:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

* * *

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture . . . " *Hall v. Cole*, 412 U.S. 1 (1973), *quoting*, 462 F.2d 777, 780-81 (2nd Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven.

S. Rep. No. 94-1011, at 2-4 (1976), *reprinted in*, U.S. Cong. Code & Adm. News (1976) at 5910. *See also* H.R. Rep. No. 94-1558 at 1 (1976).

The purpose of a statute is central to an analysis of the retroactive effect of its amendment. It is the language of the original statute that Plaintiffs relied upon in pursuing a course of conduct that would be impermissibly burdened should the amendment be applied to pending litigation. In reliance upon the original statute, Plaintiffs initiated suit, and it is this event that is relevant for measuring expectations and retroactive effect.[15]

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[15] *Cf. Landgraf*, 511 U.S. at 292 (The purpose of a fee-authorizing statute is "to encourage suit for the vindication of certain rights – so that the retroactivity event is the filing of suit, whereafter encouragement is no longer needed. Or perhaps it is to *facilitate* suit – so that the retroactivity event is the termination of suit, whereafter facilitation can no longer be achieved.") (Scalia, J., Kennedy, J., and Thomas, J., concurring) (emphasis in original).

ii. Application of §803(d) to Pending Cases Would Have a Retroactive Effect on Counsel.

It is at the time of filing that plaintiffs and their counsel enter into agreement for costs and fees, specifying the respective obligations of the attorneys and clients, including the payment mechanism for the fulfillment of those obligations. It is at that time that plaintiffs and their counsel, relying upon the law providing for compensation at prevailing market rates should plaintiffs prevail, evaluate the case, the likelihood of success and the expectations of reimbursement at a reasonable rate should they prevail. It is at that time that plaintiffs and their counsel determine what type of claims to bring and what relief to seek, whether damages, injunctive relief, or both. And finally, it is at that time that plaintiffs' counsel commit themselves ethically to continued representation of their clients to ensure that the Constitution is honored, a course of conduct that cannot lightly be altered.[16]

The PLRA's attorney's fees limitation provide that even in successful cases the fees will be capped at below market rates and impose unanticipated consequences

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[16] Although Defendants urge the judicial act of awarding fees as the relevant moment to consider retroactive effect, the purpose of the statute is not to permit or forbid the exercise of judicial power. This is not a jurisdictional statute but rather a statute that affects a party's liability for attorney's fees and in this case provides that the Plaintiffs will now be liable for those fees, either directly or through a reduction of their damages. Additionally, addressing the judicial act of awarding fees fails to reach the effect of limiting fees for services performed prior to the Act's passage.

upon the attorney and client who initiated the litigation. Congress may have the authority to legislate such changes for cases filed in the future, when the parties can take such changes into account in making their decisions. However, changing them *after* a client and his or her attorney have, by filing suit, already relied on assurances of payment if the case is successful would cause precisely the type of "manifest injustice" that *Landgraf* and similar cases sought to prevent, particularly since §1988 was designed to induce precisely such reliance on the recovery of reasonable fees based on market rates.[17] *See Landgraf*, 511 U.S. at 282, finding that "the introduction of a right to compensatory damages [to a pending case] is also the type of legal change that would have an impact on private parties' planning" and as such would result in impermissible retroactive application of statutes.

If the attorney's fee provisions of the PLRA are applied to pending cases, attorneys who were induced to file cases on behalf of citizens whose constitutional rights were being violated and who relied upon the provision for recovery of attorney's fees will be compensated well

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[17] Such an application would also raise serious due process concerns, particularly given that the PLRA establishes such a potentially large period of retroactivity, *see, Eastern Enterprises v. Apfel*, 118 S.Ct. 2131, 2152 (1998) (O'Connor, J., Rehnquist, C.J, Scalia, J., and Thomas, J.); *id.* at 2159 (Kennedy, J., concurring), and that Congress appears to have "acted with an improper motive by targeting an unpopular group for special disability." *Cf. U.S. v. Carlton*, 512 U.S. 26, 32 (1994). *See also Romer v. Evans*, 517 U.S. 620, 632 (1996) (law "imposing a broad and undifferentiated disability on a single named group [is] an exceptional and . . . invalid form of legislation.")

below market rates for hours reasonably spent in successfully litigating the cases and ensuring compliance with the Constitution.[18] The reduction brought by the PLRA's restrictions would attach new legal consequences to events completed before the PLRA's enactment – the assumption of this representation for these Plaintiffs at the expense of handling other litigation – and take away rights acquired under then-existing laws and previous court orders in this case. *Accord Jensen v. Clarke*, 94 F.3d 1191, 1202-03 (8th Cir. 1996).

iii. Application of §803(d) to Pending Cases Would Have a Retroactive Effect on Plaintiffs.

Fee awards under §1988 are to be paid to plaintiffs, and not their counsel, for Congress bestowed "statutory eligibility" upon "prevailing parties" as opposed to their counsel. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986).

Application of §803(d) limits the amount that plaintiffs can recover in civil rights litigation and reduces the compensation that they may receive. Like imposition of a

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[18] The Act caps fees at 150% of the Criminal Justice Act's hourly rates. PLRA §803(d). However, CJA rates are based on the assumption that a lawyer gets paid for all hours worked, win or lose, while under the PLRA, the lawyer gets paid only for prevailing by litigated judgment and only for those hours deemed directly related to proving the violation.

statutory damages cap, the PLRA has a "retroactive effect" by diminishing the compensation available to successful plaintiffs.

The potential for "[r]etroactive modification of damages remedies" to undermine expectations of the parties is "significant." *Landgraf*, 511 U.S. at 285 n.37. In *Landgraf* itself, this Court refused to apply an enactment retroactively which expanded a defendant's potential monetary liability. Plaintiff there filed suit in 1989 alleging sexual harassment and seeking the relief authorized by Title VII, which was limited to back pay and injunctive relief. While the case was on appeal, Congress passed the Civil Rights Act of 1991, which added compensatory and punitive damages as an available remedy for certain kinds of discrimination. This Court concluded that application of the damages provision of the 1991 Act to pre-enactment conduct would have a retroactive effect, even though backpay was already available, because it would impose a new legal burden – liability for damages – on past conduct. *Landgraf*, 511 U.S. at 282-83.

Fee shifting constitutes a remedy, albeit one that recoups litigation expense as opposed to the harm inflicted by defendants' unlawful action. "Congress enacted the fee-shifting provision as an 'integral part of the remedies' " under the civil rights laws. *Evans v. Jeff D.*, 475 U.S. at 731 (citation omitted). The amendment at issue, which alters an essential component of the fee-shifting provision by limiting attorney's fees, of necessity shifts the liability for these fees from defendants to plaintiffs. As this Court has stated, "[t]he extent of a party's liability, in the civil context as in the criminal, is an

important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84.[19]

iv. Courts Have Held Statutes Limiting Attorney's Fees Inapplicable to Pending Cases.

Consistent with the principles of *Heth* and *Landgraf*, lower courts have declined to apply statutes that limit attorney's fees in pending cases, finding them impermissibly retroactive. In *Watson v. Secretary of Health, Education and Welfare*, 562 F.2d 386 (6th Cir. 1977), the court applied the presumption against retroactive application to a statute and federal regulation limiting attorney's fees. At issue in *Watson* was Congress' 1972 amendment to the Federal Coal Mine Health and Safety Act of 1969. The amendment, which specified no effective date, authorized the Secretary of Health, Education and Welfare to

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[19] Defendants also argue that civil rights plaintiffs, at the commencement of litigation, have only a unilateral hope of fees and thus no legitimate expectation of recovery. (Defendants' Brief at 27.) First, Congress and the courts have made clear that if a plaintiff prevails in a suit covered by §1988, "fees should be awarded . . . unless special circumstances would render such an award unjust." *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) (citation omitted). More importantly, parties have the very same expectation of recovering fees that they do of recovering damages or winning any other remedy. All remedies are uncertain at the time suit is filed; yet, as *Landgraf* makes clear, 511 U.S. at 284 n.36 and n.37, retroactive modification of damage remedies have "significant" potential for mischief and are often not applied to pending cases. Finally, in both of these cases, Plaintiffs had prevailed and established their entitlement to attorney's fees at prevailing market rates ten years before the passage of the PLRA.

limit availability of attorney's fees in administrative proceedings involving black lung claims. *Id.* at 388. The court held that the regulations could not be applied to claims that were pending on the regulations' effective date because such application would create a "disfavored retroactive effect." *Id.* at 389.[20]

Amendments limiting attorney's fees in the area of social security litigation have likewise been held inapplicable to pending cases where there has been an initial adjudication on the merits prior to the passage of the amendment. *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971); *Gardner v. Mitchell*, 391 F.2d 582 (5th Cir. 1968); *Ray v. Gardner*, 387 F.2d 162 (4th Cir. 1967); *Robinson v. Gardner*, 374 F.2d 949 (4th Cir. 1967). In addition, state courts have "consistently held that statutes changing or abolishing limits on the amount of damages available in wrongful-death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment." *Landgraf*, 511 U.S. 284 n.36 (citing cases).[21]

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[20] The Court did not differentiate between hours that attorneys worked on claims prior to the promulgation of regulation and hours worked following promulgation. Rather, the Court held that if a case were pending when the Secretary published the regulation, and if the attorney had already entered in a fee agreement, then the regulation could not be applied to any hours worked on the case. *Id.* 562 F.2d at 389.

[21] Defendants attempt to analogize the PLRA to cases seeking solely injunctive relief. (Defendants' Brief at 25.) But §803(d) is not limited to injunctive claims; rather, it applies to all prisoner civil rights actions, involving damages, injunctive relief, or both, filed after its effective date. In fact, the PLRA places additional limits on attorney's fees in damage cases. *See* PLRA §803(d)(d)(2). Additionally, the fee award cannot be

Defendants' reliance on *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), in support of their argument to apply fee limits to pending cases ignores the Court's rationale for its decision. The *Bradley* Court upheld the retroactive award of attorney's fees in part because, even in the absence of application of the new fee enactment, defendants in *Bradley* were subject to a similar fee award under equitable principles, and the district court had in fact awarded fees under that theory. Defendants' expectations – unlike those of Plaintiffs and their counsel in this case – were not disrupted by imposition of a fee award under the new statute. *Landgraf*, 511 U.S. at 277. Moreover, the Court noted that equitable concerns strongly supported retroactive application to alleviate the burden facing plaintiffs who successfully challenged racially discriminatory practices. *Id.* at 277-78. No such equitable concerns are present in this case because retroactive application would benefit those who have been found to be in *violation* of the Constitution. Finally, the Court noted that in passing the statute, Congress had deleted a provision calling for it to be applied only to services rendered after its enactment. The Court stated, "we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id.* at 716 n.23.[22]

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analogized to an injunction that can be limited or modified by subsequent legislation. A fee award has no prospective effect but rather seeks to compensate plaintiffs for the costs of litigation needed to obtain redress. *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978).

[22] Cases holding §1988 applicable retroactively are not contrary. The legislative history of §1988 expressly stated that the statute was intended "to apply to all cases pending on the

Perhaps more importantly, the Court in *Bradley* never addressed the question subsequently mandated by *Landgraf*: would application of the new attorney's fee provision have a retroactive effect? It is that effect on Plaintiffs and their counsel which makes retroactive application so inappropriate here.

v. Retroactive Application of the Fee Provisions Would Impose New Duties and Obligations on Plaintiffs and Their Counsel.

Defendants argue that attorney's fee statutes are "procedural" and that, under *Landgraf*, only substantive statutes are entitled to the presumption against retroactivity. (Defendants' Brief at 24.) Defendants misstate the law. *Landgraf* created no presumption in favor of retroactive application of any statute; rather, "the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft*, 117 S.Ct. at 1878. While the *Landgraf* Court may have given "qualified" approval to applying certain procedural statutes to pending cases, *Lindh*, 117 S.Ct. at 2063-2064, "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Landgraf*, 511 U.S. at 275 n.29.

In this situation, the award of attorney's fees is more akin to a substantive provision, affecting the ability of plaintiffs to obtain and retain counsel to vindicate their

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date of enactment." H.R. Rep. No. 94-1558, at 4 n.6 (1976), *cited in Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978).

constitutional rights, than a procedural provision governing the doctrine of *forum non conveniens* or the standards for joint trials of co-defendants.[23] *Accord, Hughes Aircraft*, 117 S.Ct. at 1878, finding that statute, though phrased in " 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other" where the statute affects substantive rights of parties. Further, Defendants' characterization of entitlement to attorney's fees and damages as procedural is misplaced:

> [H]olding a person liable for attorney's fees effects a "substantive right" no less than holding him liable for compensating as punitive damages which the court treats as affecting a vested right.

Landgraf, 511 U.S. at 292 (concurring opinion).[24]

The lessened concern that courts express with regard to the retroactive effect of procedural statutes stems in part from the presumed neutrality of statutes which alter the process and modes of practice in litigation. Unlike the

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[23] In addition, this Court has noted the "logical morass of distinguishing between substantive and procedural rules." *Mistretta v. U.S.*, 488 U.S. 361, 392 (1989); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

[24] Defendants argue (Brief at 20) that the provisions are procedural and prospective as they "have no effect on the substantive judgments or awards already entered." The issue is not whether the statute affects prior judgments or awards but rather whether it alters the legal status or imposes new burdens or disability on conduct performed prior to the new law. Even under Defendants' analysis, it must be recognized that the Act affects the judgments of the district court and circuit court that Plaintiffs are entitled to all reasonable attorney's fees at market rate for their post-judgment monitoring.

instant case, procedural changes typically are not regarded as suspect for impairing parties' rights to their detriment as they usually involve "diminished reliance interests" by the parties. *Landgraf*, 511 U.S. at 275.

In affecting the ability of plaintiffs to retain their attorneys and the ability of these attorneys to continue to fulfill their ethical and contractual obligations, the statute affects more than "procedural" rights. A retroactive application would single out and burden this group of civil rights attorneys and plaintiffs who previously filed meritorious claims to eliminate constitutional violations in their state's prisons.

While the Court need not reach the question of whether Congress' singling out one unpopular group – prisoners – and specifically diminishing the incentive of attorneys to represent them constitutes an equal protection violation, similar concerns arise with a retroactive application of this section of the PLRA.[25]

The changes in the fee provisions of §803(d) impact solely the duties, rights and reliance of plaintiffs in such a way as to raise the concern that applying this statute retroactively is a "means of retribution against an unpopular group." *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998) (Kennedy, J., concurring), *citing Landgraf*, 511 U.S. at 266.

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[25] While the district court was compelled to address Plaintiffs' equal protection claim (App. At 153a-156a), the Court of Appeals did not need to reach this question, finding the statute inapplicable to pending cases. Pet. App. at 7a n.1.

The impact of the statute on those attorneys who accepted and pursued cases with the promise of adequate compensation if they prevailed is exacerbated by the reality that that decision is for all practical purposes now irrevocable, imposing clearly unanticipated burdens and duties. Aside from ethical considerations,[26] it is unlikely that any private counsel could be found to substitute under either the terms of the current PLRA or the specter of possible future reductions should the Act be deemed applicable to pending cases.

Further, in another part of the omnibus spending bill that included the PLRA, Congress removed an alternate source of representation by prohibiting any legal services organization receiving federal funds from "participat[ing] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison." Pub. L. 104-134 (1996), §504(a)(15). When combined, these two pieces of legislation serve to greatly restrict the ability of prisoners to find counsel to represent them, even if they have meritorious claims. In fact, the district court found that the fee cap will make it financially impossible for most private attorneys to accept the vast majority of cases where prison officials have violated inmates' constitutional rights – even if the claim is well-documented, liability is clear, and the violation is egregious. App. at 153a, 154a-156a. The absence of counsel is likely to be fatal

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[26] Plaintiffs' counsel could not ethically discontinue their representation despite the potential financial hardship. *Mallard v. United States Dist. Court for the Southern Dist. of Iowa*, 490 U.S. 296, 316 (1989) (Stevens, J., Marshall, J. Blackmun, J., and O'Connor, J., dissenting).

even to meritorious claims. *See Turner, When Prisoners Sue: A Study of Section 1983 Suits in the Federal Courts*, 92 Harv.L.Rev. 610, 624 (1979) ("In those few cases in which the prisoner was represented by counsel, this fact made a decisive difference.").

"In some cases, . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive adjudication" *Landgraf*, 511 U.S. at 267 n.21. Where, as here, there exist questions concerning the constitutionality of legislation,[27] this Court has held that courts should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] questions may be avoided." *Johnson v. Robinson*, 415 U.S. 361 (1974), *quoting United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). Finding that the attorney's fee limits apply only to cases filed after passage of the Act not only avoids having to decide these

[27] In addition to the due process concerns noted above, the attorney's fee provisions raise important equal protection concerns. In response to the latter, two rationales have been posited for Congress' singling-out of prisoners for decreased attorney's fees: deterring frivolous lawsuits and the desire of Congress saving the states money. Neither is supported by capping incarcerated Plaintiffs attorney's fees below the prevailing market rate rather than capping all such fees. "To fasten a financial burden only upon those . . . who are confined in state institutions . . . is to make an invidious discrimination." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). As the *Romer* court noted, 517 U.S. at 633-34 (citations omitted), "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense . . . The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.' "

unnecessary constitutional issues but is consistent with Congress' stated purpose in adopting the provision.

CONCLUSION

For the foregoing reasons, Plaintiffs/Respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Sixth Circuit and find that the attorney's fee limits of §803(d) of the PLRA are inapplicable to cases pending on the date of the statute's enactment.

Respectfully submitted,

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